Juara Aspirasi (M) Sdn Bhd v Tan Soon Ping

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–807 OF 2007
ZALEHA ZAHARI, ZAINUN ALI AND ZAHARAH IBRAHIM JJCA
16 AUGUST 2011

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Companies and Corporations — Winding up — Appeal against winding up — Whether companies failure to file affidavit in opposition to winding up petition fatal — Whether ad interim stay order prevented respondent petitioner from filing winding up petition — Whether winding up proceedings were execution proceedings — Whether appellant company unable to pay debts and ought to be wound up — Companies Act 1965 s 218 — Companies (Winding-Up) Rules 1972 r 30(1) — Rules of the High Court 1980 O 46 r 1

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Tan Soon Ping ('the respondent') obtained judgment in the sum of RM47,288.64 against Juara Aspirasi (M) Sdn Bhd ('the appellant'), a housing development company in a civil suit. The petitioner then issued a notice under s 218 of the Companies Act 1965 ('the Act') demanding payment of the judgment sum. When the appellant failed to pay the judgment sum or any part thereof to the respondent, the respondent filed a petition to wind up the appellant on the grounds that it was unable to pay its debts. The respondent's winding up petition was supported by six supporting creditors. The appellant filed an application to strike out the winding up petition instituted against it. The petitioner objected to the respondent's application. The High Court judge dismissed the appellant's application to strike out the winding up petition and granted an order in terms of the winding up petition. This was the appellant's appeal against the decision of the High Court. The appellant submitted that at the time when the winding up petition was filed by the respondent there was an ad interim stay order in place. The respondent petitioner submitted that the appellant by not filing an affidavit in opposition to the respondent's winding up petition had failed to comply with r 30(1) of the Companies (Winding-Up) Rules 1972 ('Rules') and that this non-compliance was fatal to its case.

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Held, dismissing the appeal:

(1) The technical point of not complying with r 30(1) of the Rules was fatal to the appellant's case (see para 8).

(2) The ad interim stay order was no legal impediment for the respondent to file a winding up petition against the appellant. An ad interim stay order did not mean that a winding up petition could not be filed, as bankruptcy and winding up proceedings were not within the ambit and meaning of 'execution' proceedings as provided by O 46 r 1 of the Rules of the High

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Court 1980. The fact that winding up proceedings were based on a judgment did not necessarily make these proceedings a continuation of the existing proceedings (see para 10).

(3) The High Court judge was right in ruling that the interest of the creditors in winding up prevailed over that of the appellant company and its shareholders (see para 13).

(4) In the present case there was clear and cogent evidence that the appellant company was unable to pay its debts, by reason of the winding up petition being supported by six supporting creditors. This fact had led to the presumption of insolvency being drawn against the appellant, ie that the appellant company was insolvent and unable to pay its debts, and the appellant had failed to rebut this presumption (see para 14).

[Bahasa Malaysia summary

Tan Soon Ping ('responden') memperolehi penghakiman dalam jumlah RM47,288.64 terhadap Juara Aspirasi (M) Sdn Bhd ('perayu'), syarikat pemaju perumahan dalam tindakan sivil. Pempetisyen kemudiannya mengeluarkan notis di bawah s 218 Akta Syarikat 1965 ('Akta') menuntut pembayaran jumlah penghakiman. Apabila perayu gagal membayar jumlah penghakiman tersebut atau mana-mana bahagian daripadanya kepada responden, responden memfailkan petisyen untuk menggulung perayu atas alasan bahawa ia tidak dapat membayar hutangnya. Petisyen penggulungan responden disokong oleh enam pemiutang yang menyokong. Perayu memfailkan permohonan untuk membatalkan petisyen penggulungan yang dimulakan terhadapnya. Pempetisyen membantah permohonan responden. Hakim Mahkamah Tinggi menolak permohonan perayu untuk membatalkan petisyen penggulungan tersebut dan membenarkan perintah dalam terma-terma petisyen penggulungan tersebut. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi. Perayu berhujah bahawa pada masa petisyen penggulungan difailkan oleh responden terdapat perintah penangguhan ad interim. Pempetisyen responden berhujah bahawa perayu dengan tidak memfailkan afidavit membantah kepada petisyen penggulungan responden telah gagal untuk mematuhi k 30(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah') dan bahawa ketidakpatuhan ini adalah fatal kepada kesnya.

Diputuskan, menolak rayuan:

(1) Poin teknikal apabila tidak mematuhi k 30(1) Kaedah-Kaedah adalah fatal kepada kes perayu (lihat perenggan 8).

(2) Perintah penangguhan ad interim bukan penghalang dari segi undang-undang untuk responden memfailkan petisyen penggulungan terhadap perayu. Perintah penangguhan ad interim tidak bermaksud bahawa petisyen penggulungan tidak boleh difailkan, memandangkan

kebankrapan dan prosiding penggulungan bukan dalam skop dan maksud prosiding 'execution' seperti yang diperuntukkan oleh A 46 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980. Fakta bahawa prosiding penggulungan didasarkan atas penghakiman tidak semestinya membuatkan prosiding-prosiding ini sambungan kepada prosiding-prosiding yang ada (lihat perenggan 10).

(3) Hakim Mahkamah Tinggi adalah betul dalam memutuskan bahawa kepentingan pemiutang-pemiutang dalam penggulungan mengatasi syarikat perayu dan pemegang-pemegang sahamnya (lihat perenggan 13).

(4) Dalam kes ini terdapat keterangan yang jelas dan terang bahawa syarikat perayu tidak dapat membayar hutangnya, dengan alasan petisyen penggulungan disokong oleh enam pemiutang yang menyokong. Fakta ini telah membawa kepada anggapan ketaksolvenan dibuat terhadap perayu iaitu bahawa syarikat perayu adalah tak solven dan tidak dapat membayar hutangnya, dan perayu gagal untuk mematahkan anggapan ini (lihat perenggan 14).]

Notes

For cases on appeal against winding up, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1113–1120.

Cases referred to

A Company, Re [1915] 1 Ch 520, CA (refd)
Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd [1997] 2 MLJ 756, CA (refd)
Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253, FC (refd)

Legislation referred to

Companies Act 1965 s 218
Companies (Winding-Up) Rules 1972 r 30(1)
Rules of the High Court 1980 O 46 r 1

Appeal from: Company Winding Up No 28–112 of 2006 (High Court (1), Pulau Pinang)

Ahmad Jafri bin A Rahman (J Tan & CH Lim) for the appellant.
Simon Tan (Simon Tan & Associates) for the respondent.

Zaleha Zahari JCA (delivering judgment of the court):

[1] This is an appeal against the decision of Penang High Court judge dated

6 August 2007 in granting an order in terms of the windingup petition (encl (1)) filed by Tan Soon Ping, (the petitioner/respondent in this appeal) in ordering Juara Aspirasi Sdn Bhd (the appellant in this appeal, subsequently referred to as 'the company') to be wound up. We dismissed this appeal for the following reasons.

[2] The background facts are these. On 1 November 2006 the petitioner filed a petition to wind up the company. The petitioner had on 4 February 2005 obtained judgment in the sum of RM47,288.64 against the company vide Penang High Court Civil Suit No 22–244 of 2004. Prior to the filing of the winding up petition (ie on 3 October 2006), the petitioner had, through his solicitors, issued a notice to the company under s 218 of Companies Act 1965 demanding payment of the judgment sum. The company had failed and neglected to pay the same or any part thereof to the petitioner. In this situation the petitioner contended that the company was unable to pay its debts and that it was just and equitable for the company to be wound up.

[3] Six supporting creditors gave notice of their intention to attend the hearing of the petition where the following sums were stated to be due to them from the company: CHRB Utara the sum of RM227,791.45; Khoo Yew Choo the sum of RM36,649.96; Soranam a/p Subramaniam the sum of RM38,261.19; Halijah bt Sudin & Rimi bin Bah the sum of RM17,567.12; and Raj Kane a/l Kane Edran the sum of RM16,129.10.

[4] The company did not file any affidavit in opposition to the winding up petition. The company instead filed a summons in chambers on 4 April 2005 (encl (16)) and an affidavit is support to strike out the winding up petition instituted against them. The petitioner objected to this application to strike out and took issue with the matters raised by filing an affidavit in reply,

[5] Both, encl (16) as well as the winding up petition, encl (1), came up for hearing on the same date ie 30 March 2007.

[6] The High Court judge proceeded to hear encl (16) first. Based on the affidavits filed in support and in opposition to the application to strike out, and after hearing submissions of all parties, the High Court judge dismissed encl (16). The High Court judge then proceeded to hear encl (1) on its merits. On 6 August 2007 the learned judge granted an order in terms of encl (1), which decision is the subject matter of the appeal before us.

DECISION

[7] In making a considered decision in this appeal it is common ground that the company had withdrawn their appeal against the order of the High Court

dated 4 February 2005 upon which the winding up petition was grounded. On the date of hearing of the winding up petition (30 March 2007) there was accordingly nothing pending before Court of Appeal nor before the Federal Court. In other words, for all intents and purposes, the High Court order upon which the winding petition was grounded was a final judgment.

[8] On the technical point raised of non compliance by the company of r 30(1)of the Companies (Winding-Up) Rules 1972 of failing to file an affidavit in opposition to the petition, we agree with the submission of counsel for the petitioner that the failure to do so was fatal. See *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 where Siti Norma JCA (as she then was), r 30(1) to be mandatory. Rule 30(1) states as follows:

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> (1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

[9] It was also argued before the High Court, and on appeal before us, that when the winding up petition was filed there was an ad interim stay of the order in place. This ad interim order of 14 November 2005 however had not been held out and disclosed as an exhibit by the company.

[10] On this issue we are of the view that the learned High Court was right in ruling that, even if there was an ad interim order in place, there was no legal impediment for the petitioner to file a winding up petition against the company. An ad interim stay does not mean that a winding up petition cannot be filed as bankruptcy and winding up proceedings was not within the ambit and meaning of 'execution' proceedings as provided by O 46 r 1 of the Rules of High Court 1980 which states as follows:

> In this Order, unless the context otherwise requires, 'writ of execution' includes a writ of seizure and sale, a writ of possession and a writ of delivery.

[11] In *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 at p 265 Abdul Hamid Mohamad FCJ (as he then was) in delivering the decision of the Federal Court held that a bankruptcy proceeding is not a writ of execution, which was a continuation of the existing proceeding to enforce the judgment provided by the same rules of court, ie the Rules of the High Court. Bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt, and the object being to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with the loss of control over his properties

to the official assignee. The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceedings. It is a proceeding by way of petition just like divorce, winding up or election to name a few, bears the characteristics of a fresh proceeding unlike an execution proceeding. This principle is equally applicable to winding up proceedings.

[12] In *Re A Company* [1915] 1 Ch 520, the question before the Court of Appeal was whether the execution on a judgment included the petition of winding up of a company. Lord Cozens-Hardy MR said at p 525:

> ... Now 'execution on the judgment' is a technical term. It is a legal process by which the judgment creditor, in that character and for his sole benefit, by a proceeding in the same action seeks to satisfy his judgment wholly or partially. I think it is plain that a winding up petition is not execution on a judgment. It lacks almost every element of such an execution.

[13] On the issue of the company being a developer, and public interest required consideration of the fact that one hundred units had been sold, and the effect winding up order would cause the company's operation as a housing developer to suffer losses, the fact is that the petitioner, is also a purchaser who had obtained judgment against the company for late delivery. The High Court judge in our view was right in ruling that the interest of the creditors in this winding up petition prevail over that of the company and its shareholders.

[14] On the facts of this case we are satisfied that there was clear and cogent evidence that the company was unable to pay its debts, by reason of the winding up petition being supported by six supporting creditors. This fact clearly demonstrate the company's liabilities. The failure to pay these creditors for almost RM300,000 was itself indicative that the company was insolvent and unable to pay its debts. The presumption of insolvency having arisen the onus shifted to the company to demonstrate that it was able to pay its debts. This, the company had failed to do.

[15] The High Court had, therefore based on the facts and circumstance of this case, not erred in exercising his discretionary power in ruling that the company was unable to pay its debts and in granting an order in terms of that prayed for in the winding up petition.

For the abovementioned reasons the appeal was dismissed and the decision of the High Court judge affirmed.

Appeal dismissed.

Reported by Kohila Nesan